IN THE UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

LAMB WESTON, INC.	)	
	)	
Respondent,	)	Case No. 15-CA-207924
And	)	
	)	
AMANDA DEXTER,	)	
An individual	)	
	)	
Charging Party.	)	
	)	

RESPONDENT'S BRIEF TO THE ADMINISTRATIVE LAW JUDGE

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RESPONDENT'S POST-HEARING BRIEF

Respondent Lamb Weston, Inc. ("Respondent," "Lamb Weston" or the "Employer"),[1] by and through the undersigned counsel, and pursuant to §102.42 of the Board's Rules and Regulations, as amended, hereby timely files its post-hearing brief.

I. PRELIMINARY STATEMENT AND OVERVIEW

This case arises out of challenged work rules. The matter was tried before Administrative Law Judge ("ALJ") Arthur Amchan in New Orleans, Louisiana, on September 14, 2018.

The underlying Amended Complaint alleges that Lamb Weston violated Section 8(a)(1) of the National Labor Relations Act (the "Act") by the mere maintenance of certain work rules at its Delhi, Louisiana facility. These unfair labor practice charges were filed by Amanda Dexter, an individual and a former employee at Lamb Weston's facility in Delhi, Louisiana.

The core of the Amended Complaint is the allegation that "Respondent has been interfering with, restraining and coercing employees in the exercise of the rights guaranteed in Section 7 of the Act, in violation of Section 8(a)(1) of the Act" by maintaining the rules outlined in the recently amended paragraph 6 of the Amended Complaint.[2]

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[1] Lamb Weston was spun off from ConAgra Foods in November 2016. (Tr. 26). Some exhibits refer to the employer as ConAgra Foods, and those references should be understood to refer to Lamb Weston.

[2] Counsel for the General Counsel filed a Motion to Partially Withdraw Paragraph Six of Amended Complaint on October 10, 2018. The motion seeks to delete from the Amended Complaint allegations regarding General Rules of Conduct numbers 19, 27 and 29 and the Code of Conduct relating to confidentiality. That motion was granted on October 16, 2018. Thus, this brief focuses solely on the remaining allegations of the Amended Complaint, namely General Rules of Conduct numbers 11, 35 and 36; and sections 9.1, 13.2 and 13.3 of the Employee Handbook (Joint Exhibit 3); and portions of the Employee Agreement (Joint Exhibit 3).

Each of these allegations is without any merit whatsoever. The essential elements and obvious shortcomings of Counsel for General Counsel's Amended Complaint are relatively straightforward:

- Counsel for General Counsel alleged that seven (7) rules interfere with, restrain and coerce employees in the exercise of their Section 7 rights;
- Counsel for General Counsel failed to even attempt to offer any proof that any employee at the Delhi facility was even aware of how any of these rules conceivably could, much less would, be read to apply in any way to activities protected by Section 7 of the Act. In fact, the sole basis for the allegations that the rules are unlawful is the collective opinion of NLRB Region 15 attorneys who have offered, at most, only their own conclusory (undefined and unsupported) arguments that the work rules would reasonably interfere with employees' Section 7 rights. Such opinions, especially when offered by an Agency that is not neutral on the issue of what should or should not constitute a violation of the Act, and when that Agency is undergoing a fairly radical change in how it approaches such issues, cannot be considered to equate to the actual evidence needed to prove that these work rules are restrictive of employees' rights.
- Additionally, while Counsel for the General Counsel failed to offer any evidence that any of the challenged work rules have been reasonably read to restrict an activity protected by Section 7, Lamb Weston presented solid, in most cases undisputed, evidence of the legitimate business justifications underlying each of the rules.

This case presents basic questions regarding how far the NLRB can be permitted to go in its attempts to interfere with and limit an employer's legitimate needs to enforce their reasonable work rules and procedures. It is certainly appropriate, for example, that the NLRB might argue an employer's no-solicitation rule is unreasonably restrictive and – if enforced – could obviously limit employees' rights to engage in solicitation during non-working time. Such policies have traditionally been seen as facially restrictive — if written too broadly or selectively enforced. However, that is not the same as the claims presented here.

In this matter, Counsel for General Counsel's argument is that the challenged work rules, which are based on the Employer's entirely legitimate and reasonable concerns, should be subservient to biased and entirely unproved claims that employees' alleged Section 7 rights have to be preserved at all costs. However, the slight – if any at all – impact on employees' Section 7 rights does not even come close to the critical importance of each of the challenged work rules.

Moreover, this case is set against a backdrop of rapidly shifting positions by the NLRB regarding its own earlier, overly intrusive interferences with rational and necessary employer rules and policies. As discussed below, the Board has taken a series of recent steps to strike more appropriate balances between reasonable protection of Section 7 rights and employers' legitimate need to maintain workplace policies underpinned by business justifications. Indeed, many of the work rules challenged in this case have been addressed in some manner by either the Board or federal courts – in recent decisions, or through memoranda or other guidance. *See e.g.*, *The Boeing Co. Inc.*, 365 NLRB No. 154 (Dec. 14, 2017); *Memorandum GC 18-02* (December 1, 2017) (noting the General

Counsel's interest in providing an "alternative analysis" in cases involving workplace rules); *Memorandum GC 18-04* (June 6, 2018) (providing guidance to the Regions with regard to the proper standards for analysis when the mere maintenance of work rules is at issue).

For these reasons, the Amended Complaint should be dismissed in its entirety.

II. REVIEW OF RELEVANT FACTS

The relevant facts in this matter – as established through testimony and record evidence – are essentially undisputed. Only one witness, Dan Downard, testified, subject also to cross-examination.

A. Overview of Lamb Weston's Business

While Lamb Weston has a farm, dairy, vegetable processing plant, public warehouse and repack center, Lamb Weston is primarily in the business of making French fries. (Tr. 26). Lamb Weston began in the 1950s, grew by acquisitions, and was eventually purchased by ConAgra Foods in the late 1980s. (Tr. 27). Lamb Weston remained a wholly-owned subsidiary of ConAgra Foods until November of 2016, when it was spun off as a standalone, publicly-traded company. (Tr. 27, 28-9). Lamb Weston has approximately eighteen (18) facilities in North America, with most being French fry plants. (Tr. 26).

Lamb Weston supplies French fries to many well-known quick service and other restaurants or food service providers across the globe. (Tr. 27). Additionally, it makes products for sale at retail outlets. (Tr. 27).

Lamb Weston zealously protects its intellectual property and proprietary information. (Tr. 28-9). Indeed, Lamb Weston got an early boost from this type of asset.

The company's founder, Gil Lamb, invented a process to convert whole white potatoes into French fry strips by shooting potatoes floating in water through a knife blade set at around 75 to 80 miles per hour. (Tr. 28-9). This patented process, known as a water gun knife, provided the company an early advantage before the patent expired. (T. 28-9). Lamb Weston has invented other cutting systems currently in use for products sold to generally recognizable customers in the quick service and fast food industries that give Lamb Weston a competitive advantage. (Tr. 29). Lamb Weston also protects financial and production information. (Tr. 27-28). The latter includes information about plant layout, manufacturing equipment (design, spacing, adjustments), and production numbers (such as data related to efficient use of raw product to test results on finished goods. (T. 29, 34-35). Employees at the Delhi plant obviously have access to proprietary information such as the plant layout, production processes, details about the equipment, etc. Some employees also have access to confidential quality information. (Tr. 35).

As a company producing a food product for people to consume, Lamb Weston's reputation is a key asset. Lamb Weston has many checks and balances around food safety. (Tr. 36). And, it takes its food quality assurance program equally as seriously. (Tr. 34-5). Any misrepresentation about the Delhi plant's food safety or quality assurance programs would be very detrimental. (Tr. 37).

B. Lamb Weston's Delhi, Louisiana Plant is Unique

Delhi was the first plant built from scratch by Lamb Weston in a number of decades. (Tr. 24). Dan Downard, the only testifying witness, was there for the start-up of the Delhi facility. (Tr. 24). Making French fries from sweet potatoes is different than making them from white potatoes. The Delhi plant was constructed differently than Lamb

Weston's other plants and specifically to optimize production of sweet potato French fries. (Tr. 32). The Delhi facility produces sweet potato French fries approximately 99% of the time it is in operation. (Tr. 31).

C. Review Of The ULP Allegations Remaining for Adjudication

The original ULP charge was filed by Amanda Dexter, a former Delhi employee, on October 13, 2017. (GC Exhibit 1(a)). The original ULP charge had absolutely nothing to do with any work rules. The first amended charge was filed on December 21, 2017. (GC Exhibit 1(c)). The first amended charge dropped all references to the allegations of the original charge and substituted challenges to approximately eighteen (18) work rules or policies. There were no allegations in the original ULP charge or the first amended charge that Ms. Dexter's rights, or those of any other Delhi employee, had been infringed upon by enforcement of the work rules or policies challenged in the first amended charge. (GC Exhibits 1(a) and 1(c)). Subsequent to the first amended charge, the General Counsel dropped its challenge to various work rules, leaving only the seven (7) remaining as of the Partial Withdrawal of Paragraph Six of the Amended Complaint.

III. ARGUMENT AND CITATION OF AUTHORITY

A. Counsel For General Counsel Bears The Burden To Prove By A Preponderance Of The Relevant Evidence Each Element Of Its Complaint Allegations

In a ULP proceeding, the Board bears the burden of proof and persuasion to show that the employer has engaged in alleged unfair labor practices. *See Unifirst Corp.*, 346 NLRB 591, 593 (2006); *Ferguson Enterprises, Inc.*, 349 NLRB 617, 618 (2007) (noting it is Counsel for the General Counsel's burden to prove that Respondent violated Section 8(a)(5)); NLRB Statement of Procedure §101.10 ("the Board's attorney has the burden of

proof of violations of section 8 of the National Labor Relations Act"). If the Board does not meet this burden by a preponderance of the evidence, there can be no finding that any ULP actually occurred. *See Unifirst Corp.*, at 593.

Counsel for General Counsel's burden of proof obligation also must take in account the overall context of the situation under review. Here, for example, examination of the challenged work rules in a facility where a reputation for high-quality and safely consumable food products is paramount and where intellectual property and proprietary information must be protected "is obviously different than enforcing the same . . . [rules] in a workplace where no such overriding . . . concerns are present." *Memorandum GC 18-04* (noting that the "type and character of the workplace" must be considered in examining whether a particular policy might be overly restrictive). Counsel for General Counsel failed to meet its burden to prove that any of the work rules remaining subject to challenge – when weighed against the background of the legitimate business justifications established by Lamb Weston – had any impact on employees' rights under Section 7.

Moreover, with respect to Counsel for the General Counsel's burden to prove that any of the challenged rules somehow actually violate the Act, the Agency must produce some objective proof that the mere maintenance of these policies would materially interfere with an employee's protected rights under the Act. Counsel for General Counsel can no longer argue that an employer is in violation of the Act just because NLRB attorneys might speculate that such a policy or policies *could* interfere with employees' rights. *Id.* They must show – by producing material evidence, and not just their own suppositions – that the policies under review *would* have such a prohibited impact. Counsel for General Counsel failed to meet its burden on these claims.

B. Counsel for the General Counsel Failed to Meet Its Burden to Prove That Any of the Challenged Work Rules Violate Section 7 Of The Act

1. Analyzing Workplace Policies Under the *Boeing Co., Inc.* Case

The Board's decision in *The Boeing Co. Inc.*, offers clear guidance for review of the instant case. 365 NLRB No. 154. In *Boeing*, the Board set out a new standard for evaluating all facially neutral policies or handbook provisions, such as those present here. Specifically, the Board now evaluates two criteria: (i) the nature and extent of the potential impact on NLRA rights, and (ii) legitimate justifications associated with a rule or policy.[3] *Boeing*, at 3. Under this approach, a rule cannot be unlawful if – when reasonably interpreted – "the nature and extent of the potential impact on NLRB rights" is outweighed "by legitimate justifications associated with the [rule]... ." *Id* at 14.

The Board was clear in its instruction that a "reasonable interpretation" of the *Boeing* standard is to be considered from the perspective of a "reasonable employee." *Id* at n. 16. Moreover, "[i]n determining whether a challenged rule is unlawful, the Board must . . . give the rule a reasonable reading. It must refrain from reading particular phrases in isolation, and it must not presume improper interference with employee rights." *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 646 (2004). It is not enough that the rule "merely could possibly be read" to restrict employee rights; instead, there must be reasonable proof that employees actually would interpret the rule to interfere with Section 7 rights. *NLRB v. Arkema, Inc.*, 710 F.3d 308, 318 (5th Cir. 2003).

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[3] With *Boeing*, the Board overruled the more restrictive "reasonably construe" language set forth in *Lutheran Heritage Village-Livonia*, which deemed facially neutral policies unlawful if employees could "reasonably construe" the language to prohibit Section 7 activity, *without further inquiry*. 343 NLRB 646 (2004).

These interpretive principles – which permit employers like Lamb Weston necessary leeway to adopt reasonable rules – especially serve to accommodate employers' important interests in advancing "legitimate business purposes," such as avoiding "significant financial risk" of liability where a managerial employee, for example, fails to adequately protect the information of an employee entrusted to the company and inputted into its human resources information system by Lamb Weston employees as a part of their job duties[4] or from harm to its reputation where an employee performs an act detrimental to its reputation.[5] *See Adtranz ABB Daimler-Benz Transp., N.A. v. NLRB*, 253 F.3d 19, 27 (D.C. Cir. 2001).

This *Boeing* standard is intended to strike a more proper balance between asserted business justifications for employer policies, and the desire to protect employees' Section 7 rights to engage in concerted activity. *Id.* at 3. It is crucial, however, to understand that, where a facially neutral policy (when *reasonably* interpreted), "would not prohibit or interfere with the exercise of NLRA rights, maintenance of the policy is lawful without any need to evaluate or balance business justifications." *Id.* In such event, "the Board's inquiry into maintenance of the policy comes to an end." *Id.*

The Board in *Boeing* confirmed that analysis of workplace rules and policies now places them into one of three categories:

- **Category 1:** These are policies that the Board designates as lawful to maintain, either because (1) the policy, when reasonably interpreted, does not prohibit or interfere with the exercise of NLRA rights; or (2) the potential adverse impact on

[4] See the Employee Agreement (Jt. Ex. 3; Tr. 51).

[5] See Work Rule 36. (Jt. Ex. 2, page 36).

protected rights is outweighed by justifications associated with the policy. According to the Board, this category includes, without being all-inclusive, no camera policies, and workplace civility policies such as those requiring "harmonious interactions" among employees.

- **Category 2:** Policies that warrant individualized scrutiny on a case-by-case basis, as to whether a policy, when reasonably interpreted, would prohibit or materially interfere with the exercise of NLRA rights and, if so, whether adverse impact on NLRA-protected conduct is outweighed by legitimate business justifications.
- **Category 3:** Policies that the Board designates as unlawful to maintain because they would clearly prohibit, or materially limit, NLRA-protected conduct, and the adverse impact on NLRA rights is not outweighed by justifications associated with the policy. According to the Board, this category would include such things as a policy that – on its face – would restrict Section 7 rights.

2. Subsequent Guidance Based on General Counsel Memorandum 18-04

The Board has provided subsequent and ongoing guidance regarding proper interpretation of the *Boeing* standards by issuing a series of General Counsel Memoranda. On June 6, 2018, General Counsel Peter Robb explicitly stated, in Memorandum GC 18-04[6], that "the Board severely criticized *Lutheran Heritage* and its progeny for prohibiting any policy that could be interpreted as covering Section 7 activity, as opposed to only prohibiting policies that would be so interpreted." *Memorandum GC*

[6] As set forth at the outset of the document, "This memorandum contains general guidance for Regions regarding the placement of various types of policies into the three categories set out in *Boeing* regarding Section 7 interests, business justifications, and other considerations that Regions should take into account in arguing to the Board that specific Category 2 policies are unlawful." *Memorandum GC 18-04.*

18-04. In that Memorandum, Mr. Robb expressed the Board's view that "Regions should now note that ambiguities in policies are no longer interpreted against the drafter, and generalized provisions should not be interpreted as banning all activity that could conceivably be included." *Id.*

C. Counsel for The General Counsel Failed to Prove that Lamb Weston's Problem Resolution Procedure is Unlawful.

1. The Problem Resolution Procedure is a Category 1 Rule Under *Boeing.*

The Problem Resolution Procedure appears on pages 31 and 32 of the Delhi Employee Handbook. (Jt. Ex. 2). The Amended Complaint restates only a portion of this process. The material portions of this process are quoted below:

> **Section 9: PROBLEM RESOLUTION**
> ConAgra Foods[7] believes that *any employee having a complaint or question should have the opportunity to discuss it with management*. It is also understood *that channels of communication are to be kept open and flexible*. Only in this way can there be satisfactory adjustment of differences or misunderstanding which sometimes occur when people of different skills, temperaments (sic), and personalities work together in groups within the framework of any organization. *We strongly encourage employees with questions to use this procedure*. The purpose of the following procedure is to determine if Company policy was followed. The problem resolution procedure is not intended as a mechanism to re-write or set Company policy. No employee will be discriminated or retaliated against solely for bringing a question or issue to our attention.
>
> **9.1 Problem Resolution Procedure**
> *An employee having a question or issue* concerning any matter relating to wages, hours or working conditions (including termination of employment or any other discipline, any aspect of the job, an employee's relationship with the Company or a coworker, etc.), or the interpretation of any of

[7] ConAgra Foods is the predecessor to Lamb Weston. (Tr. 26).

the provisions of this Handbook or any of the Company's policies or rules, *should follow these procedures*:

STEP 1: Since your Team Leader is often in the best position to help, your first step generally is to discuss the problem with your immediate supervisor. You must discuss the problem with your Team Leader within seven (7) calendar days of the occurrence of the complaint or problem (or when you knew or should have known of its occurrence). The Team Leader will answer the question or complaint within seven (7) calendar days.

STEP 2: If you are not satisfied with the response at Step 1, the next step is to take the matter to our Human Resources Manager. All we ask is that you do so in writing, on appropriate form, within seven (7) calendar days of receiving your Team Leader's answer because we strongly believe that it is best to get questions, concerns and problems resolved as quickly as possible. The Human Resources Manager will give you a written response within seven (7) calendar days.

STEP 3: If you are not satisfied with the Human Resources Manager's response, the next step is to refer your written form to the next level of management by requesting the Human Resource office to arrange a review by or meeting with the Plant Manager. You must do so within seven (7) calendar days of receiving the Human Resources Manager's response, and you will receive a response within ten (10) calendar days after the Human Resource office received the request for review.

STEP 4: If you are not satisfied with your response at Step 3, you may refer your form to our corporate Human Resource office in Kennewick, Washington, by making a written request within seven (7) calendar days of receiving the Step 3 response. The appropriate designated representative will conduct a proper review which may involve one or more meetings with the parties, witnesses, etc., but you will normally receive a written reply within ten (10) calendar days. We may need to extend the timeframes for response at one or more steps in unusual circumstances (for example, where more time is needed to investigate your complaint) but you will be informed of any such delay. We likewise can extend the timelines for your role in the process if absolutely necessary, but do want to adhere to these guidelines as much as possible in order to promptly resolve your concerns.

(Jt. Ex. 2, page 31) (emphasis added).

2. When reasonably interpreted, by a reasonable employee, the Problem Resolution Procedure does not prohibit or interfere with the exercise of NLRA rights.

As an initial matter, the Problem Resolution Procedure does not explicitly prohibit protected activity in any respect. It expressly and only gives employees the opportunity to raise their concerns, and "strongly encourage[s]" them to use this process. In no way does it require employees to use this process or preclude them from using any other avenue for redress. The ALJ, therefore, must apply the precedent and guidance set forth in *Boeing* and its progeny, as well as the memoranda cited herein. In doing so, there should be a finding that Respondent's Problem Resolution Procedure constitutes a Category 1 rule. As noted, *Boeing* shifted the focus from policies that "*could* be interpreted as covering Section 7 activity" to those that "*would* be so interpreted." Merely encouraging employees to use this dispute resolution process, while clearly not requiring its use or precluding any other avenues of redress or conversation, does not facially infringe on Section 7 rights.

Lamb Weston's evidence also showed that the Problem Resolution Procedure is a Category 1 rule. Mr. Downard explained that, at its essence, the Problem Resolution Procedure was a workplace civility type of rule. (Tr. 40). It allows for an environment where problems could be resolved at the lowest level and at the earliest time. (Tr. 40). By doing so, it allows for and encourages harmony in the workforce. (Tr. 40).

A rule only violates the Act when it actually unlawfully restricts protected activity. *Cf. Helton v. NLRB*, 656 F.2d 883, 888-97 (D.C. Cir. 1981) (holding that a union

committed a ULP by removing employee speech critical of union from bulletin boards where other employee speech was permitted). At the Delhi facility, the Problem Resolution Procedure only encourages employees to use it. It does not restrict or even impinge upon any forms of concerted activity.

Finally, Counsel for the General Counsel offered no evidence that the Dispute Resolution Procedure had, in fact, ever had any negative impact on the exercise of a Delhi employee's Section 7 rights, or that any employee was ever disciplined for not using the Problem Resolution Procedure.

3. At the Very Least, Respondent's Problem Resolution Procedure Must Be Seen As A Lawful Category 2 Rule Under *Boeing*.

Even if Respondent's Problem Resolution Procedure warranted "individualized scrutiny" as a Category 2 rule, the entirely legitimate business justifications offered into evidence by Lamb Weston establish the procedure as lawful.

Mr. Downard testified that Lamb Weston wanted to encourage employees to raise issues and concerns, whether formally or informally. (Tr. 40). He likened the Problem Resolution Procedure to a grievance process at a unionized plant.[8] (Tr. 40). The purpose was to solve problems where they arose and as soon after they arose as possible, thereby allowing for a harmonious workplace. (Tr. 40). Mr. Downard added that the Problem Resolution Procedure also supported efficiency. He noted that, without a way to resolve problems, employee issues would "stew" and distract from what should be happening at work. (Tr. 41). Further, not only did Mr. Downard testify that the Problem Resolution

[8] That there is no NLRB precedent where a collective bargaining agreement's grievance process somehow unlawfully precludes employees from discussing their concerns with other employees shows the hypocrisy of the challenge to this completely inoffensive dispute resolution process.

Procedure does not require employees to use it nor preclude employees from talking to other employees about their concerns, he testified that Delhi employees do absolutely talk with other employees about their concerns. (Tr. 41). In other words, the undisputed evidence is that Delhi employees do not understand the Problem Resolution Procedure to restrict their Section 7 right to talk with other employees about workplace concerns. On this record, the Problem Resolution Procedure is lawful.

4. Even if *Boeing* were not applicable, the Dispute Resolution Procedure is Lawful.

A review of the NLRB jurisprudence on challenges to employer work rules regarding dispute resolution procedures shows why a decision like that in the *Boeing* case was inevitable. The earliest cases dealt with by the NLRB involving employer policies to raise complaints included either an express threat of discipline if an employee failed to use the process[9] or an express instruction to an employee to not raise concerns to the employer's customers.[10] Like a hammer to a nail, the NLRB began to claim that any dispute resolution process, even ones that did not have the express problems identified in the early cases, ran afoul of Section 7 rights. The Board was doing what *Boeing* stopped – reading rules so that they could implicate Section 7 activity even though no reasonable employee would read them that way. Even before the Board decided *Boeing*, federal courts were putting the brakes on the Board's misinterpretation of this type of rule.

In *Hyundai America Shipping Agency, Inc. v. N.L.R.B.,* 805 F.3d 309 (D. C. Cir. 2015), the Court reversed the Board's decision that Hyundai's complaint provision in its

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[9] *Kinder-Care Learning Centers, Inc.,* 299 N.L.R.B. 1171 (1990).

[10] *Guardsmark, LLC,* 344 N.L.R.B. 809 (2005), *aff'd in relevant part, 475 F.3d 369 (D.C Cir 2007).*

handbook prohibited complaints protected by Section 7. Hyundai's handbook's complaint provision stated:

> Voice your complaints directly to your immediate supervisor or to Human Resources through our 'open door' policy. Complaining to your fellow employees will not resolve problems. Constructive complaints communicated through the appropriate channels may help improve the workplace for all.

Id. at 315-16. The Court pointed out that the Hyundai provision lacked the "mandatory language" present in other cases where it had upheld rules actually banning protected workplace complaints. *Id.* This "mandatory language" is exactly what was unlawful in the early NLRB cases. There was no "mandatory language" in Hyundai's complaint process, nor is there any in Lamb Weston's.

In fact, the Problem Resolution Procedure in the Delhi employee handbook is even more permissive than the provision upheld in *Hyundai*. It merely gives employees the "opportunity to discuss" issues with management. Delhi employees are "strongly encouraged" to take advantage of the process. The only semi-mandatory language in the Problem Resolution Procedure relates to timeliness. Where an employee chooses to raise an issue through the process, he/she "must discuss the problem with your Team Leader within seven (7) calendar days" from when the issue arose. This language obviously does not in any way suggest that employees must use this process to the exclusion of any other process or that employees can not discuss problems with anyone else and at any time. No reasonable employee, or even an unreasonable employee, would read it to impose either such limitation. The Problem Resolution Procedure must be found lawful.

D. Counsel for the General Counsel Failed To Prove That Work Rule 11 Would Reasonably Have Any Effect On Employees' Section 7 Rights.

Work rule 11 prohibits: Fighting, horseplay, words or conduct, which are likely to provoke or cause bodily injury or property, (sic) damage or otherwise interfere with Company operations. (Jt. Ex. 2, page 29).

1. Work Rule 11 is a Lawful Category 1 Rule under *Boeing*.

Memorandum GC 18-04 makes this work rule a Category 1 rule in two ways. First, the memorandum provides that rules regarding on-the-job conduct[11] that adversely affects the employer's operations are lawful category 1 rules. It proceeds to note that employers have legitimate interests in preventing non-cooperation at work and the right to expect employees to perform their work during working time. Finally, the memorandum notes that fact-finders should not presume any impact on NLRA rights where such rules, like this one, do not have any reference that Section 7 activity is forbidden. Memorandum GC 18-04, pages 6-7.

Memorandum GC 18-04 applies in an additional way to work rule 11. Section 1(D) of the memorandum makes clear that rules applicable to disruptive behavior, such as horseplay, are presumptively category 1, lawful rules. Memorandum GC 18-04, pages 8-9. This portion of the memorandum also addresses a concern of the Counsel for the General Counsel. The memorandum expressly states that such lawful category 1 rules about disruptive behavior also may address, as work rule 11 does, words or verbal misconduct. The memorandum notes expressly that such lawful category 1 rules may

[11] Work rule 11 admittedly is not expressly limited only to on-the-job conduct. However, many of the work rules in the Employee Handbook similarly do not have such a limitation but clearly apply only to work-related matters. (Jt. Ex. 2, pages 29-30; see work rules 2, 4, 8, 9, 17, 25, 30 and 33). A reasonable employee would understand the rule's application to be to on-the-job activities.

prohibit "words" such as yelling, profanity, hostile or angry tones, verbal abuse, and threats. *Id.* at 9.

In sum, work rule 11 plainly is a lawful category 1 rule.

2. Work Rule 11 is Lawful, even if a Category 2 Rule Under *Boeing*.

Mr. Downard testified that this work rule establishes a minimum standard of conduct for a professional working relationship and to eliminate distractions from the workplace. (Tr. 59). Counsel for the General Counsel inquired about the necessity of prohibiting "words" that are likely to provoke injury, property damage or interference with Company operations. Mr. Downard explained, consistent with the plain language in GC Memorandum 18-04, that verbal altercations can be as distracting as physical altercations, as well as obviously being a prelude to them. (Tr. 60). A work rule that reasonably addresses an employer's proactive concern to avoid workplace altercations and disruptions by prohibiting disruptive language such as provocative words applies directly to the employer's interests in safety and efficiency of production. GC Memorandum 18-04, at page 9. Viewed as a Delhi employee subject to the rule, the rule would not be reasonably understood to apply to protected activities. Counsel for the General Counsel offered no evidence that work rule 11 has ever been applied to or understood to apply to protected activities. Lamb Weston's legitimate interests in having the rule outweigh any minimal impact on Section 7 rights that could possibly result. Consequently, work rule 11 is lawful under a category 2 analysis.

E. Counsel for the General Counsel Failed to Prove That the Employee Agreement Would Have Any Impact on Employees' Section 7 Activity or, if so, that Such Impact Outweighed Lamb Weston's Legitimate Business Interests for the Employee Agreement.

Lamb Weston will concede that the Employee Agreement, Joint Exhibit 3, is not a category 1 rule under the *Boeing* analysis. However, the *Boeing* analysis still applies, and properly interpreted, the Employee Agreement is a lawful category 2 rule.[12]

Mr. Downard testified that the Employee Agreement was intended to be used primarily with salaried employees, as the very first line of the first page of Joint Exhibit 3 states, and does not apply to employees whose job duties do not require them to deal with *the Company's* confidential information. (Tr. 46-47, 51). The purpose of the Employee Agreement's confidentiality provision is that these employees who would, based on their job duties, have access to the proprietary confidential information maintained by the Company, are consequently expected "to hold company information confidential." (Tr. 47, 51). Employees like those in human resources "have access to employee files, data, information, benefit elections." (Tr. 48). Similarly, finance specialists have access, based on their job duties, to social security numbers, deductions and other information. (Tr. 48). "[B]ecause of your job responsibilities, you have access to information" belonging to the Company that should be protected. (Tr. 48).[13] Mr. Downard explained that the Employee Agreement does not restrict an hourly employee from

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[12] The Employee Agreement's confidentiality provisions do not amount to a Category 3 rule because they do not restrict employees from sharing or disclosing any information that is not confidential or proprietary Company information. The Employee Agreement does not proscribe an employee from sharing his/her own wages or working conditions. Nor does it prohibit employees from sharing information about other employees, so long as the employee's job duties did not require the employee to confidentially maintain employee information or the information became known to the disclosing employee from a non-confidential source.

[13] Mr. Downard testified that Ms. Dexter, the charging party, was mistakenly asked to sign the Employee Agreement. (Tr. 48-49). The confidentiality provisions in Joint Exhibit 4, which Ms. Dexter also signed, actually were intended apply to her. Mr. Downard explained that, during the rush of hiring associated with the start-up of the Delhi plant, the Employee Agreement, intended primarily for salaried employees, mistakenly became included in the on-boarding packet for Delhi's hourly employees. (Tr. 49). This mistake was limited to Delhi.

sharing his/her own wage or employee information, as it applies to Company information. (Tr. 47-50).

The text of the Employee Agreement supports Mr. Downard's testimony. On page 1 of Joint Exhibit 3, entitled "Information Regarding the Employee Agreement," the following portions of the Employee Agreement should be considered:

- The introductory paragraph states its application to salaried employees and other employees as their job duties warrant; it also states as a purpose "the protection of confidential and proprietary information."

- The second and third paragraphs of numbered paragraph 2 note its application to the security of information in the Company's possession (not applicable to information in the possession of employees) and further notes that the Company spends thousands of dollars every year to acquire and use this confidential and proprietary information successfully.

- The fourth paragraph of numbered paragraph 2 reinforces the protection of information within the Company

- The sixth paragraph of numbered paragraph 2 notes that various laws apply to the Company's protection of some of its confidential information.

All of the above portions of page 1 of the Employee Agreement would be interpreted by a reasonable employee at Delhi to apply only to information possessed by the Company, which was maintained confidentially and/or was proprietary to the Company, not to information of or about the employee.

Portions of page 2 of the Employee Agreement also reinforce the limited scope of the commitment to information of the Company:

- The introductory language specifically states its purpose to "safeguard confidential and proprietary information."

- Recital C states, "In connection with my employment, I may have access to, and I may use and/or contribute to the Company's and/or Affiliates' Confidential Information, as defined below."

- Section 2 addresses the "Company's ... human resources information." This plainly addresses information housed by the Company, not possessed by an employee.

- The last sentence of section 2 expressly states that the Company's Confidential Information does not include information that is generally known or becomes available.

Beyond the need for employees who have job duties that cause them to come into contact with the Company's information about other employees and who have a duty to protect the security of the other employees' information, as Mr. Downard testified, the French fry business is competitive, and Lamb Weston has developed substantial assets consisting of proprietary and confidential competitive information. (Tr. 27-29). The Employee Agreement legitimately protects those interests as well.

The *Boeing* case requires a straightforward analysis of the Employee Agreement. It should not be strained or stretched such that it could be read to create a conflict with Section 7 rights. It should be read as a reasonable employee would read the Agreement.[14]

While the Board has not yet had a chance to address a confidentiality rule in light of the *Boeing* decision in a squarely applicable way, a recent decision by another Administrative Law Judge is instructive. In *Legacy Charter, LLC*, 28-CA-201248; 2018 BL 293910 (August 16, 2018), the General Counsel alleged a very similar confidentiality provision was unlawful because it applied to "'personnel information' that employees are

[14] In this situation, the ALJ should read the Employee Agreement as a reasonable employee who would normally be asked to sign this agreement would read it. Ms. Dexter's job duties generally would not have caused her to need to sign this agreement. (Tr. 51). Having Ms. Dexter sign the agreement unnecessarily does not create a conflict with the NLRA because the scope of the Employee Agreement is plainly limited to protecting Lamb Weston's confidential information, even though Ms. Dexter had no access to that information as a part of her job duties. As a result, Ms. Dexter could not have violated the Employee Agreement. Indeed, Counsel for the General Counsel presented no evidence that any Delhi employee had been alleged to have violated the Employee Agreement or understood it to apply to Section 7 activity.

given 'access to, contact and knowledge of.'" *Id.* at 14-15. The General Counsel argued that Legacy Charter's confidentiality agreement would be understood to include information teachers normally acquire in a non-confidential capacity and may disclose for a protected purpose. Administrative Law Judge Wedekend rejected the General Counsel's argument:

> [R]ead as a whole, the provision is clearly directed at preventing disclosure of business information that is *both* confidential and proprietary. Thus, the very first sentence of the provision states that it is concerned with "certain trade secrets and *confidential proprietary business information* of the School" (emphasis added). And the seventh sentence describes such information as that which was "designed and developed by the School at great expense and over lengthy period of time; [is] secret, confidential and unique; and constitute the exclusive property of the Company."

Id.

The analysis of Judge Wedekend, applying the common-sense reading required by *Boeing*, should be applied to the Employee Agreement. The Employee Agreement states in several ways that it applies only to information in the custody of the Company, the type of information that the Company has invested thousands of dollars to obtain, retain and use successfully. It states in two places that its application is warranted based on the signatories' job duties. In essence, it is an agreement designed and intended for employees who legitimately should be expected to sign an agreement like the Employee Agreement. Due to a mistake associated with the start-up of the Delhi plant, Ms. Dexter was asked to sign the Employee Agreement when she should not have – her job duties did not warrant its execution. However, asking employees who work in human resources or finance to sign the Employee Agreement is entirely lawful – employees who, due to the nature of their job duties, have access to their employer's confidential information,

including but not limited to personnel information, wages and terms and conditions of employment, may legitimately be expected to sign the Employee Agreement. It is not unlawful that Ms. Dexter, who had no access to the confidential and proprietary information of the Company, was asked to sign the Employee Agreement, as no reasonable employee at the Delhi plant would have understood it to apply to his/her Section 7 activities.

Even before the *Boeing* case, the Board in *Mediaone of Greater Florida, Inc.*, 340 N.L.R.B. 277 (2003), applied similar reasoning in the context of a more broadly applicable confidentiality rule. First, the Board recognized that employers have a right to protect private business information, including human resources information. *Id.* at 278. The Board found that the broadly applicable confidentiality rule of *Mediaone* (as opposed to the Employee Agreement which is intended for a subgroup of employees whose job duties directly involve confidential and/or proprietary information belonging to the Company) that defined "employee information, including organizational charges and databases" as confidential would not cause an employee to reasonably understand that it prohibited discussion of wages, hours, working conditions or any other terms and conditions of employment. *Id.* Even though the Employee Agreement specifically addresses the protection from disclosure of very specific examples of "human resources information," it plainly does so in the context of informing employees whose job duties require them to deal with the Company's confidential human resources information, and employees "would reasonably understand it was designed to protect the confidentiality of …[human resources information entrusted to or obtained Lamb Weston for which there is

a duty of safekeeping] rather than to prohibit discussion of employee wages." *Id. See also Lafayette Park Hotel*, 326 N.L.R.B. 824 (1998).

Federal courts also recognized that employers can have rules to protect the confidentiality of their own information without running afoul of Section 7 rights and that rules enforcing such confidentiality obligations should not be unreasonably twisted to try to make them apply to Section 7 activities. In *Community Hospitals of Cent. California v. NLRB*, 335 F.3d 1079 (D.C. Cir. 2003), the Court held that the employer's rule prohibiting the "[r]elease or disclosure of confidential information concerning ... employees ..." to be a lawful effort to protect *its* confidential information. *Id.* at 1088 (citing *Lafayette Park Hotel*, 326 N.L.R.B. at 825). Directly applicable to the Employee Agreement, the Court specifically held that employers could require employees who are privy to their employer's confidential information to maintain the confidentiality of that information, even if that confidential information is about another employee:

> [T]he Board's object to this provision appears to rest chiefly upon the possibility that an employee might believe the rule prohibits him from revealing information, such as wages or a disciplinary record, concerning himself. Unlike the provision at issue in *Brockton Hospital*, ..., however, the rule covers only "confidential" information. Confidential information is information that has been communicated or acquired in confidence. A reasonable employee would not believe that a prohibition upon disclosing information acquired in confidence, "concerning patients or employees" would prevent him from saying anything about himself or his own employment. *And to the extent that an employee is privy to confidential information about another employee or a patient, he has no right to disclose that information contrary to the policy of his employer . . . .*

Id. at 1089 (emphasis added).

The D.C. Circuit further explained the distinction between lawful rules protecting the confidential information belonging to the employer, as was found in the *Community Hospitals* case, from unlawful rules that applied more broadly to restrict disclosure or discussion of "information *concerning* the company", as the rule provided in its *Hyundai* case (*see* 805 F. 3d at 315), and of information "concerning" other nurses, as the rule provided in its decision in *Brockton Hosp. v. NLRB*, 294 F.3d 100, 106 (D.C. Cir. 2002) The Employee Agreement protects confidential information **of the Company**, not concerning the Company and not of employees, and squarely falls within the rationale of these cases that an employer acts lawfully when requiring employees to protect its confidential information and that rules which are obviously intended for this legitimate purpose should not be unreasonably interpreted to reach Section 7 rights.

The Employee Agreement should be found to be lawful.

F. Counsel for the General Counsel Failed To Prove That Work Rule 35 Would Reasonably Have Any Effect On Employees' Section 7 Rights.

Work rule 35 prohibits: Refusing to courteously cooperate in any Company investigation, including discussing the investigation or interview with other employees unless specifically authorized to do so. (Jt. Ex. 2, page 29).

Even prior to the *Boeing* decision, the Board found rules requiring employees to cooperate in Company investigations to be completely lawful. *See* Memorandum GC 15-04 (March 18, 2015), page 9. Thus, Lamb Weston understands Counsel for the General Counsel will focus on the last clause of work rule 35, regarding the discussion of the investigation with other employees.

Work rule 35 does not require non-disclosure in all cases. Mr. Downard testified that confidentiality during investigations is not required "across the board" and

confidentiality will be addressed in a "closing remark" during an interview, if confidentiality is necessary. (Tr. 39). The application of work rule 35 is consistent with its express language, which notes that confidentiality is assessed on a case-by-case basis.

By its express terms, work rule 35 allows the Company to require confidentiality during an investigation when appropriate. It is not an absolute prohibition. No reasonable employee would read work rule 35 to restrict their Section 7 rights, and certainly, the discretionary language included in the rule prevents any "unwarranted logistical leaps" to conclude that confidentiality is required routinely or inappropriately. *See Banner Health System v. NLRB*, 851 F.3d 35, 44-45 (D.C. Cir. 2017). Case-specific applications of confidentiality requirements during investigations are not unlawful. *Id. See also Banner Health Systems*, 358 NLRB 809 (2012). Further, Counsel for the General Counsel produced no evidence that confidentiality was required in any inappropriate case.

Work rule 35 should be found lawful.

G. Counsel for the General Counsel Failed To Prove That Work Rule 36 Would Reasonably Have Any Effect On Employees' Section 7 Rights.

Work rule 36 prohibits: Engaging in any activity or performing any act that reflects adversely upon the Company or is detrimental to its reputation or interests. (Jt. Ex. 2, page 30).

GC Memorandum 18-04 notes that employers have a legitimate interest in the protection of their reputations. (*Id.* at 11-13). Even before the *Boeing* case was decided, the Board has approved the lawfulness of work rules very similar to work rule 36. *Lafayette Park Hotel*, 326 NLRB at 825 (approving a work rule prohibiting: "Unlawful or improper conduct off the hotel's premises or during non-working hours which affects the employees' relationship with the job, fellow employees, supervisors, or the hotel's

reputation or good will in the community."); *Albertson's, Inc.*, 351 NLRB 254, 259 (2007) (approving a work rule prohibiting: "off-the-job conduct which has a negative effect on the Company's reputation or operation or employee morale or productivity."). Even before *Boeing*, that any employee would reasonably fear that a work rule like work rule 36 would reach conduct protected by the Act "is, quite simply, far-fetched." *Lafayette Park Hotel*, 326 NLRB at 827.

Work rule 36 should be found to be lawful.

H. Counsel for the General Counsel Failed To Prove That Any Employee Would Reasonably Understand the Solicitations Rule To Have Any Effect On Employees' Section 7 Rights.

Counsel for the General Counsel refused to state specifically exactly what portion of the Solicitations Rule (Jt. Ex. 2, page 42) was the focus of his challenge. (Tr. 37-38). However, Lamb Weston understands the concern to relate solely to the last bullet point of the rule:

- Certain types of material – including obscene, profane or *inflammatory* items and political advertisements or solicitations – will not be permitted.

(Jt. Ex. 3, page 42) (emphasis added).[15] Counsel for the General Counsel's argument that the word "inflammatory" is unlawfully overbroad lacks merit. First, "[a]lthough [Lamb Weston's] employees are perhaps unlikely to know the term *ejusdem generis*, they no doubt grasp as well as anyone the concept it encapsulates..." *Community Hospitals*, 335

[15] Counsel for the General Counsel did state that that "[p]olitical advertisements may also implicate Union materials as well." (Tr. 37). While that statement may be true, obscene or profane items equally could implicate Union materials. The entire point of *Boeing* is to move away from the speculative, "could have been" mode of analysis and instead focus on whether a reasonable employee would understand a ban on the distribution of political advertisements or solicitations to restrict his/her Section 7 rights. Lamb Weston submits that no reasonable employee would have such an understanding. Even if an employee did have such an understanding, Mr. Downard explained the Company's legitimate justifications for the rule – to reduce divisiveness associated with political activities and thereby promote efficiency. (Tr. 45-6).

F.3d at 1088-89. The "inflammatory items" referenced in the last bullet point of the Solicitations rule is clearly of a kind similar to obscene and profane. *Id.* Mr. Downard testified that "inflammatory" was intended to be "in that same vein" as profane or obscene – something that one person may not find offensive but would offend someone else. (Tr. 45). No reasonable employee would understand "inflammatory" to limit his/her ability to distribute union materials. Indeed, Mr. Downard testified that the Delhi plant has had a union, that union materials have been distributed at the plant, and that no one has been penalized or disciplined for doing so. (Tr. 46). The inclusion of the word "inflammatory" does not render the Solicitations rule unlawfully overbroad.

I. Counsel for the General Counsel Failed To Prove That Any Employee Would Reasonably Understand the Off-Duty Employees Rule To Have Any Effect On Employees' Section 7 Rights.

The Off-duty Employees rules states:

> Off-duty employees are welcome to return to our property for bona fide business reasons or in other unusual or emergency situations. Off-duty employees are also only allowed in the operating areas of the plant with the permission of the Plant Manager or delegate.

(Jt. Ex. 2, page 42).

Lamb Weston submits that this is properly considered a category 2 rule under *Boeing*. Mr. Downard explained that safety was a primary consideration for this work rule. (Tr. 42). The Delhi plant uses anhydrous ammonia in its processes. In order to ensure a complete evacuation in the event a need arose, Lamb Weston needs to know who is on its property. (Tr. 42-43). But off-duty employees are allowed on-site for 'bona fide business reasons.' While that term is undefined in the rule, Mr. Downard testified that employees do in fact return to the plant in their off-duty time. (Tr. 43). As an example,

Mr. Downard testified that the Delhi plant has many husband/wife employees, and that the off-duty spouse, sometimes with children, will come to the plant during the working employee's break or meal period. (Tr. 43). He added that such visits are encouraged. (Tr. 44). So, while the rule may not be a mode of clarity, in that the term "bona fide business reasons" is not defined, the undisputed evidence of record is that the Delhi employees do not understand the rule to prohibit their return to the plant in their off-duty hours. As a result, the rule should not be found unlawful.

IV. SUMMARY AND REQUEST FOR DISMISSAL OF ALLEGATIONS

For several years, the NLRB embarked on an aggressive quest to attack and invalidate employers' work rules and policies – in both union and non-union settings. The Agency's efforts went further and further beyond the review and disassembling of only clearly questionable rules and policies.

As its concerted attack on employer rules and policies continued, employers were faced with increasingly critical questions regarding what appeared to be entirely reasonable efforts to provide guidance to employees, and to structure and protect their organizations.

In most of the incursions into employers' rules and policies, the NLRB had absolutely no initial evidence that particular rules/policies had ever been complained about or questioned by the employees. The standard of proof – for the NLRB – became nothing more than whether an Agency attorney or field agent could conceive that a policy might – someday – pose an interference.

The NLRB has begun to pull back such unwarranted and speculative attempts to invalidate rules that conceivably would never have any actual impact on employees'

Section 7 rights. The instant case represents an attempt by Region 15 to continue a campaign against employer rules – even in the face of rapidly shifting views at the NLRB and in the absence of any underlying event to indicate any concern with the work rules. The case started with an attack on eighteen work rules, with the challenge dwindling to now the remaining seven.

Here, with absolutely no proof of any actual, or perceived, impact on employees' Section 7 rights, Counsel for General Counsel has asked that seven work rules designed to address a variety of Lamb Weston's legitimate business interests be invalidated.

Counsel for General Counsel failed to satisfy its burden to prove that any of the work rules constitute actual intrusions into employees' NLRA rights, or that such policies are otherwise discriminatory.

For all the reasons detailed in this post-hearing brief, it is respectfully requested that the Complaint be dismissed in its entirety.

Dated: October 19, 2018

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CERTIFICATE OF SERVICE

I hereby certify that on the 19th day of October, 2018, a true and correct copy of the foregoing **RESPONDENT'S POST-HEARING BRIEF** was filed using the National Labor Relations Board on-line E-filing system on the Agency's website and copies of the aforementioned were therefore served upon the following parties via electronic mail on 19th day of October, 2018, as follows:

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